IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-55

BROADWAY BOOKS, INC.
Appellant,

v.

COMMONWEALTH OF VIRGINIA, et al.
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF VIRGINIA

JURISDICTIONAL STATEMENT

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Appellant appeals from the final order and judgment of the Supreme Court of the Commonwealth of Virginia entered April 10, 1978, pursuant to 28 U.S.C. § 1257 (2).

OPINIONS BELOW

The Opinion of the Circuit Court of the City of Richmond is not reported. The Order refusing the Petition for Appeal by the Supreme Court of Virginia is not reported. Both the aforesaid Opinion and Order refusing the Petition for Appeal are set forth at Appendix B to this statement.

JURISDICTION

Appellant (hereafter referred to as Broadway) initiated its action for Declaratory Judgment and Temporary Injunction pursuant to the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution challenging the constitutionality of the Virginia Obscenity Statute which provides for the dissemination of obscene material by libraries, schools and institutions of higher learning supported by public appropriation and subjects everyone else to criminal liability for the same acts. The Memorandum of Decision and Order appealed from was entered on September 16, 1977, which dissolved the Temporary Injunction granted on June 21, 1977 and renewed on August 6, 1977. Notice of Appeal was filed in the Circuit Court of the City of Richmond, Division I, on September 19, 1977. The Petition for Appeal was refused by the Supreme Court of Virginia on April 10, 1978 whereupon a Notice of Appeal to this Court was filed in the Supreme Court of Virginia on May 3, 1978.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1257 (2). Broadway challenged the constitutionality of Sections 18.2 372-386, Virginia Code Annotated, as being repugnant to the United States Constitution both on their face and in their application. In denying Declaratory relief and a Permanent Injunction the Circuit Court of the City of Richmond ruled, in its Opinion set forth in Appendix B, that the aforesaid statute was consistent with the Constitution of the United States. In refusing Broadway's Petition for Appeal the Supreme Court of Virginia sustained the statute. Broadway

relies on the interpretation of §1257 (2) as stated in *Largent v. Texas*, 318 U.S. 418 and *Lawrence v. State Tax Commission*, 286 U.S. 276.

In pertinent part the Circuit Court opinion set forth in Appendix B at page reads:

> "The classification therefore contained in Code Section 18.2-383 is directed at the attainment of a legitimate state interest and is not therefore violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and this Court so holds."

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

I. Does a State Statute that allows distribution and dissemination of *obscene material* by institutions of higher learning *supported* by *public appropriation*, allow the sovereign State of Virginia to encourage, participate and engage in unlawful conduct along with such institutions contrary to the intent of its own legislature making the State a party to the crime in addition to creating a gross denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States to the Appellant and the entire adult citizenry of the State of Virginia.

II. Does the Lower Court's finding that Broadway did not have standing to challenge Section 18.2-383 on the basis that Broadway was a commercial enterprise and not a non-profit, non-commercial and/or non-private institution abridge Broadway's guarantee of due process of law under the Fourteenth Amendment to the United States Constitution?

III. Does an individual who is subjected to the application of a State Statute lack standing to call into question the entire statutory scheme where the repugnant exemption contributes to the infirmity of the entire Statute and denies due process of law and equal protection of the law under the Constitution of the United States?

IV. Is the finding of the Lower Court that Sections 18.2-372-386 are not void for vagueness and overbreadth and not in violation of the United States Constitution solely on the basis of two decisions by the Supreme Court of Virginia upholding the Virginia Obscenity Law in 1974 which was entirely different from the present provisions amount to a denial of due process under the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This case commenced June 2, 1977 when Broadway appeared before the Circuit Court of the City of Richmond, Division I, on a Petition for Declaratory Judgment. The Appellant petitioned that Court to declare that Section 18.2-372-386, Virginia Code Annotated, the Virginia Obscenity Statute, to be invalid on the ground of its being repugnant to the Constitution of the United States. The Court heard arguments from both Broadway and the State and Ordered that the State be temporarily enjoined from arresting and prosecuting the servants, agents, and employees of Broadway until August 16, 1977. The aforesaid Order is set forth in Appendix B. The Court ordered briefs to be filed by counsel for both parties.

On August 16, 1977 the parties reappeared before the Court wherein Broadway was allowed to file an amended petition for Declaratory Judgment. After hearing further arguments the Judge extended the Injunction for thirty (30) more days, at which time he indicated he would render an Opinion.

On September 16, 1977, the Circuit Court of the City of Richmond by Memorandum of Decision and Order, declared the aforementioned Statute to be consistent with the Constitution of the United States and removed the Temporary Injunction which protected the servants, agents and employees of Broadway from being arrested by the agents of the Commonwealth. Said Decision and Order is set forth at Appendix B.

A timely Notice of Appeal was filed on September 19, 1977 in the Circuit Court of the City of Richmond, Division I, and was subsequently refused by the Supreme Court of Virginia without opinion on April 10, 1978. (Set forth at Appendix B). The Notice of Appeal to this Court was filed in the Supreme Court of Virginia on May 3, 1978. (Said Notice is set forth at Appendix C)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by this Appeal are substantial and of broad public importance. The Supreme Court of the Commonwealth of Virginia has ignored the invidious discrimination of Section 18.2-383 and the vagueness and overbreadth of the Virginia Obscenity Law as a whole as advanced by Broadway.

The failure to invalidate this repugnant statute has contributed substantially to the "chill" of the First Amendment rights of Broadway, those members of its class who are not supported by public appropriation, and the adult citizens of the City of Richmond to receive presumptively protected First Amendment material. By denying Broadway's Motion for a Permanent Injunction and its subsequent Petition for Appeal the highest court of the State of Virginia has maintained the substantial inequity of this statute that allows one party to commit an offense with impunity while treating the same act by another as criminal all in direct conflict with the equal protection guidelines mandated by this Court.

I. Does a State Statute that allows distribution and dissemination of *obscene material* by institutions of higher learning *supported* by *public appropriation*, allow the sovereign State of Virginia to encourage, participate and engage in unlawful conduct along with such institutions contrary to the intent of its own legislature making the State a party to the crime in addition to creating a gross denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States to the Appellant and the entire adult citizenry of the State of Virginia?

The Honorable Court below was of the opinion that the only new issue raised by Broadway which has not been "definitively" decided by the Virginia Supreme Court is:

> ". . . whether Code Section 18.2-383 of the Virginia obscenity statute (which enumerates certain entities which are exempted from the operation of the statute), is unconstitutional on its face, and/or, in its application because it denies the equal protection of the laws to Broadway, its agents, servants and employees as guaranteed under the Fourteenth Amendment to the Constitution of the United States?"

In attempting to dispose of this issue, the Court first directed its attention to whether or not Broadway has standing to attack the constitutionality of Section 18.2-383. In order to support its finding, Broadway is of the opinion that the Court strained and narrowed the legal formula enunciated by this Court in the case of *Freedman v. Maryland*, 380 U.S. 51 (1965) which dealt with an individual's standing to call into question the entire statutory scheme of a statute wherein he was subjected to the application or threat of application of a provision within that statute.

This Court, in *Freedman*, speaking to the fact that the Court of Appeals of Maryland had held that since Freedman refused to submit a film to the State Board of Censors before exhibiting the same, which is required under Section 2 of that particular statute, that "he has restricted himself to an attack on the section alone, and lacks standing to challenge any of the other provisions (or alleges shortcomings) of the statute." 233 MD at 505, 197 A.2d at 236, found that the Court of Appeals had erred. This Court explained:

> "Appellant has not challenged the submission requirement in a vacuum but in a concrete statutory context. His contention is that s.2 effects an invalid prior restraint because the structure of the other provisions of the statute contribute to the infirmity of s.2; he does not assert that the other provisions are independently invalid." at 653 (emphasis added)

As in the instant case, the statutory scheme and not a single provision contributed to the infirmities of the section from which petitioner appeals. In this case Broadway contends that the threat of the application of Sections 18.2-372-386 with their averred vagueness and overbroadness contribute to the infirmity of Section 18.2-383 which, if taken alone does not have the perverse impact and effect upon petitioner's constitutional rights of due process and equal protection but, taken as a whole creates a mechanism which strips Broadway of its rights to disseminate presumptively protected material by constituting an invalid prior restraint in forcing self-censorship and presenting the real danger of unduly suppressing protected expression.

> "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing

> discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. 'One . . . may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure It.' *Thornton v. Alabama,* 310 U.S. 88, 97, 84 L.Ed 1093, 1099, 60 S.Ct. 736; see Staub v. *City of Baxley,* 355 U.S. 313, 319, 2L.Ed2d 302, 309, 78 S.Ct. 277; *Saia v. New York,* 334 U.S. 558, 92 L.Ed. 1574, 68 S.Ct. 1148; *Thomas v. Collins,* 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 615; *Hague v. CIO,* 307 U.S. 496 83 L.Ed. 1423, 59 S.Ct. 954; *Lovell, v. City of Griffin,* 303 U.S. 444, 452-453, 82 L.Ed. 949, 954, 58 S.Ct.666.
>
> Standing is recognized in such cases because of the " . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of *sweeping and improper application,"* (emphasis supplied) *NAACP v. Button,* 371 U.S. 415, 433, 9 L.Ed.2d 405, 418, 83 S.Ct. 328 . . ." at 653.

It is important to note that the position taken by the Court of Appeals was specific and exact, i.e., that because Freedman had violated a specific section he had restricted himself to a constitutional attack upon that section alone. It is this position that this Court disagreed with. The lower court in the instant case attempted to creat a distinction between this case and *Freedman* by reasoning that the Supreme Court had approved the manner in which Freedman attacked the statutory scheme and used that for a basis for giving him the requisite standing.

There is no question that this Court dealt with the specific fashion in which Freedman attacked the statute in its dictum

wherein it discusses the position taken by Freedman as opposed to that taken by the Court of Appeals but it was not the *manner* by which Freedman attacked the statute that led to this Court's conclusion that Freedman had the requisite standing, but to the contrary, this court maintained that Freedman had challenged the Section 2 in a concrete statutory context, not in a vacuum.

The Court below, in its opinion, agreed that the statutory structure of the Maryland provisions noted in *Freedman* had

> ". . . such a pervasive impact and effect upon Freedman's obligation and requirement to submit the film as required under Section 2 of the statutory scheme, that such other parts of the statutory scheme contributed to the constitutional infirmity of Section 2 and therefore, *Freedman's* appeal of this Section 2 violation necessarily put in issue the constitutionality of those other provisions of the statutory scheme."

Broadway fully agrees with the Court below where it held that a pervasive impact and effect of certain statutory provisions against petitioner, as in *Freedman,* would contribute to the averred infirmities, draw the entire scheme into question and resolve any doubt as to the standing of the petitioner to attack any or all of the aforementioned provisions. Such is the instant case. Section 18.2-383 reads as follows:

> *Exceptions to application of Article*-Nothing contained in this article shall be construed to apply to:
>
> (1) The purchase, distribution, exhibition or loan of any book, magazine or other printed or manuscript material by any library, school, or institution of higher learning, *supported by public appropriation;*

(2) The purchase, distribution, exhibition, or loan of any work of art by any museum of fine arts, school, or institution of higher learning, *supported by public appropriation;*

(3) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum of fine arts, school or institution of higher learning, *supported by public appropriation.* (Code 1950, 2.18.1-236.2; 1960, c.233; 1966, c.516; 1975, cc. 14, 15.) (emphasis supplied)

Contrary to the Honorable judge's opinion, the *similarities* between *Freedman* and the case at bar are *dramatic, apparent* and clearly render that decision on point with the instant case. In stating that Broadway did not have standing to attack the Section 18.2-383, the exemption provision, the lower Court ignored its own admonishment. Section 18.2-383 operates to create a prior restraint on Broadway only through the other provisions of the obscenity statute and coupled with the vague and overbroad provisions of Section 18.2-374 through 377, a perverse impact and effect is constituted upon Broadway's obligation and requirement under the obscenity statute as a whole, as in *Freedman.*

To comprehend the unique position that Section 18.2-383 places Broadway and all persons and institutions not supported by public appropriation, it is enlightening to ask oneself the following:

(a) What is Broadway's obligation and requirement under Section 18.2-374, 375, 376-377?

The answer is obvious - not to distribute or disseminate in any way obscene material.

(b) What is the obligation and requirement of institutions of higher learning and persons *not* supported by public appropriation?

Obviously the same obligation and requirement exist for institutions of higher learning and persons not supported by public appropriation as for Broadway.

(c) What pervasive impact and effect upon Broadway's obligation and requirement as aforesaid does Section 18.2-383 have?

Obviously, it requires Broadway, institutions of higher learning not supported by public appropriations and *all* others outside the protection of the exemption to engage in self-censorship prior to dealing with any material that may be obscene for fear of prosecution, and exempts from any obligation or requirement the following institutions: "any library, school, museum of fine arts, theatre, or institution of higher learning *"only where supported by public appropriation."*

It is the position of Broadway that Section 18.2-372-386, Va. Code Ann., as it appears on its face is an arbitrary, unreasonable and capricious classification which in its application impairs the First Amendment freedoms of the petitioner herein without demonstrating a compelling state interest. "The ultimate test of validity is not whether the classes differ, but whether the differences between them are pertinent to the subject with respect to which the classification is made." *Ashbury Hospital v. Cass County,* 326 U.S. 207 (1945). In its opinion the lower court stressed the presumption that the Section 18.2-383 exemption intended to exempt non-private, non-profit and non-commercial institutions from liability thus equating the dissemination of obscene material to the public

by institutions supported by public appropriations as being safet to the morals of the commjnity while the dissemination of obscene matter to the public by institutions, persons and everyone else not supported by public appropriations as constituting a public evil. This arbitrary classification, however, is not cured by the fact that the presumption that the exemption of Section 18.2-383 is based on commerical or non-commercial grounds but is faulty for THERE IS NO LANGUAGE IN THE AFOREMENTIONED SECTION RESTRICTING THE EXEMPTION TO NON-COMMERICAL, OR NON-PRIVATE, OR NON-PROFIT INSTITUTIONS. The epitomy of the capriciousness of the classificaton noted herein is that, as presently stated, the exemption provision would protect institutions supported by public appropriation from criminal liability for commercially disseminating obscene material and IN FACT, IT HAS SERVED THIS PURPOSE.

As stated in its Memorandum In Support of Petition for Declaratory Judgment, on April 15, 1977, in the Commonwealth of Virginia, a group of students at the University of Virginia in Charlottesville, an institution supported by public appropriation, exhibited commercially to the general public, for a fee, the motion picture *Deep Throat*, generally considered an obscene film. Almost simultaneously, in the City of Richmond, an individual was tried and found guilty under the aforementioned statute for distributing the *same film*. Based on the aforementioned points Broadway avers that the finding of the lower court was in error where it stated: ". . . the reasons for the classifications contained in Code Section 18.2-383 are natural, substantial and reasonable in light of the subject matter and the evil sought to be eliminated. The evil here sought to be eliminated being the elimination of the commercialization of obscene materials, which enjoy no constitutional protection. . . Further, since the dissemination of obscene materials in public establishments for purely commercial purposes may offend the morals of a community, the State has an obligation to the

public to protect the morals of the community." Broadway adds, by allowing the State to distribute obscene material through its monopoly? If the State were sincerely interested in protecting the populace from obscenity, Broadway respectfully submits it would speak to the issue of commercialization in the exemption.

In its opinion the lower court erred in finding that the Section 18.2-383 has "no direct or indirect effect upon any other part of the prohibitions or requirements made upon Broadway by any other part of the Virginia obscenity statutory scheme," in its effort to substantiate its contention that Broadway has no standing to attack the aforementioned provision coupled with the holding that Broadway's averment that the classification was arbitrary. Broadway reiterates that, as in *Freedman* supra, it is this perverse impact and effect by the statutory scheme as a whole that contributes to the infirmity of Section 18.2-383 that affects its obligation and requirement under Section 18.2-372-386 and constitutes the prior restraint self-censorship. In fact, Section 18.2-383 is of no bearing alone, it is not until Broadway or one outside of the exemption is prosecuted or about to be prosecuted that the Section 18.2-383 becomes operative and directly, in concert with the other infirm provisions of this statute, constitutes the necessary perverse impact which also gives the requisite standing.

Wherefore, Broadway avers that by the application or threat of application of Section 18.2-372-386 including the grossly unconstitutional denial of equal protection by and through Section 18.2-383 that it has the requisite standing to draw the statutory scheme into question and that the lower Court erred in finding otherwise.

II. Does the Lower Court's finding that Broadway did not have standing to challenge Section 18.2-383 on the basis that Broadway was a commercial enterprise and not a non-

profit, non-commercial and/or non-private institution abridge Broadway's guarantee of due process of law under the Fourteenth Amendment to the United States Constitution?

The Lower Court took great pains, as did the State in its memorandum of law to distinguish Broadway as a commercial, private, profit-seeking entity. Broadway fully agrees with the aforementioned conclusions. However, the lower Court and the State in the Opinion and memorandum respectively, repeatedly stressed that Section 18.2-383 sought to exempt "clearly non-private, non-commercial, non-profit institutions supported by public appropriations" in their efforts to bolster the premise that Broadway did not have standing to attack Section 18.2-383. The lower Court emphasized:

> "It is therefore clear that the General Assembly has in Code Section 18.2-383, drawn a line between conduct undertaken by commercial entities and the rule established in *Wayside*, supra, emphastically mandates that in such an instance, Broadway does not have standing to rely upon the hypothetical rights of those in the commercial zone, but which are also libraries, schools, or institutions of higher learning, museums of fine arts and theatres, but not supported by public appropriation in order to attack the constitutionality of Code Section 18.2-383."

In the instant case it is clear that the lower court's reliance on the distinction between commercial and non-commercial entities in connection with the exemption statute is wholly without justification. No where in the aforementioned section is the distinction made between commercial and non-commercial in any way, shape or form.

If the Legislature, in its infinite wisdom, had intended the exemption only to apply to non-commercial or non-profit or non-private or any combination of these terms, it would have

so stated. For example, Article 66A, Section 23 of the Annotated Code of Maryland states in pertinent part:

> "This article shall not apply to any non-commercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes. . ."

Broadway reiterates that the example of the University of Virginia showing of *Deep Throat* to the public for a fee is ample evidence to illustrate the inherent unconstitutional grounds both on its face and in its application against Broadway of the Virginia obscenity statutes and that the Court erred in not finding Broadway has the requisite standing to challenge the entire statutory scheme on the grounds of arbitrary classification, denial of due process in its application or threat of application, denial of equal protection and infrigment of First Amendment rights.

Broadway submits that although the Commonwealth of Virginia has the power to regulate obscenity it must do so with great care for there exists a "thin and delicate line" between that expression which falls within the protection of the First Amendment and that which does not. In its present state, the obscenity statutes of Virginia should be declared unconstitutional for freedom of expression is unduly impaired.

Broadway further avers that the lower court erred in finding Broadway did not come within the purview of *Freedman*, supra, in that it challenges Sections 18.2-372-386 in a concrete statutory context, is threatened by application and as such are repugnant to the United States Constitution and must be declared as unconstitutional to protect its freedom of expression.

III. Does an individual who is subjected to the applicaton of a State Statute lack standing to call into question the

entire statutory scheme where the repugnant exemption contributes to the infirmity of the entire Statute and denies due process of law and equal protection of the law under the Constitution of the United States?

The lower Court, at page 8 of its opinion indicates that no issue was raised as to whether Freedman, supra, was within the zone of interest sought to be protected by the Maryland Censorship Statute as is presented in reference to Broadway and the Virginia Obscenity Statute in the case at bar. The Court further goes on to state as follows:

> "Further, there was no issue raised in *Freedman* as to whether he had requisite standing to challenge the constitutionality of all sections of the Maryland Censorship Statute, and the only issue presented in *Freedman*, pertinent to this point here, was whether, in fact, he had done so by appealing his conviction under Section 2 of the Maryland statute.
>
> Here, unlike in *Freedman*, the initial issue to be resolved is whether Broadway is within the class of those entities affected by the exemption section of the Virginia Obscenity Statute and thus has requisite standing, in the first instance, to challenge the constitutionality of the Virginia Obscenity Statute on the ground of an alleged illegal classification and consequent denial of the equal protection of the law as protected by the Fourteenth Amendment to the Constitution of the United States, not whether Broadway has in fact done so, as was the case in *Freedman*.

Obviously, the lower Court has misread *Freedman*, for a close reading at 13 L.Ed 2d page 653, footnote 3 reveals the following:

> "3. Appellant also challenges the constitutionality of S.6, establishing standards as invalid for vagueness under the due process clause; S.11, imposing fees for the inspection and licensing of a film, as constituting an invalid tax upon the exercise of freedom of speech; and s.23, allowing exemptions to various classes of exhibitors as denying him the equal protection of the laws. In view of our result, we express no views upon these claims."

As one can readily see, this Court at page 653 stated: "although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute," referred to in footnote 3 indicating that Freedman had challenged other sections of the statute, including the section allowing exemptions, alleging he was denied equal protection of the laws just as Broadway has done in the case at bar. Therefore, the lower court's conclusion that the issue as to whether Freedman was within the zone of interest was not placed before this Court is misplaced.

Article 66A, Section 23 of the Maryland Annotated Code, as involved in *Freedman*, entitled "Exemptions", reads in pertinent part as follows:

> "This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning . . ."

One look at this Section will make it obvious that it is similar to the exemption under the Virginia statute, and that Freedman made an attack similar to that made by the Petitioner herein and there are no distinctions between *Freedman* and the case at

bar that are dramatic and apparent and which render that decision inapposite, for the contrary conclusion is the proper one.

This statute does not specify the specific types of sexual conduct that it prohibits, nor does the statute, on its face or by recent judicial construction comport with the *Miller* guidelines and as a result thereof does not give fair notice to the average person of the meaning of obscenity and it is unconstitutionally vague and overbroad in light of the new test of obscenity promulgated in *Miller*.

Therefore, in view of the fact that the authority cited by the Court below in support of the constitutionality of this statute, came about as as result of the judicial construction of an earlier statute, there is no basis in law or fact for the lower Court's conclusions.

IV Is the finding of the Lower Court that Section 18.2-372-386 are not void for vagueness and overbreadth and not in violation of the United States Constitution solely on the basis of two decisions by the Supreme Court of Virginia upholding the Virginia Obscenity Law in 1974 which was entirely different from the present provisions a denial of due process under the Fourteenth Amendment to the Constitution of the United States?

In his Opinion of September 16, 1977 (App. B), the Honorable Judge Sheffield, in connection with Broadway's claim that Sections 18.2-372-386 are void for vaguenss and overbreadth and as such are repugnant to the United States Constitution stated:

> "This Court finds no merit in Broadway's attack upon the statute for vagueness or overbreadth. Broadway's argument that the Sections 18.2-372, *et. seq.* are void for vagueness and for overbreadth have been previously rejected by the Virginia Supreme Court and are not therefore open now for new discussion. See: *Price v. Commonwealth*, 214 Va. 490 (1974) and *Alexander v. Commonwealth*, 215 Va. 539 (1974)."

Although the Honorable Judge below relies on *Price*, supra, and *Alexander*, supra, to support his finding of no merit to Broadway's attack on Section 18.2-372-386 as to vagueness and overbreadth, the learned Judge's analysis is misplaced, for *Price* and *Alexander* dealt, in 1974, with an entirely different statute than Section 18.2-372-386 as the present statute fails to disclose, on the face of the provisions, the specific requirements set forth by this Court in *Miller v. California*, 413 U.S. 15 (1973), and in view of the fact that this statute has not been authoritatively construed to bring it in line with *Miller*, supra, the decisions in both *Price* and *Alexander* give it no strength and vitality in connection with its constitutionality.

CONCLUSION

Broadway reiterates that "when the law lays an unequal hand on those who have committed instrinscally the same quality of offense and sterilizes one and not the other, it has made an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *McLaughlin v. State of Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535; *Yick W. v. Hopkins*, 118 U.S. 356.

The effect of Section 18.2-383 is to forbid almost any contact with "obscene" material by anyone who occupies a private status, but to allow the same contact by anyone who occupies a position supported by public appropriation.

Another way of saying this is that obscenity is only obscene when owned, operated or otherwise acted upon by private individuals.

The question, then, is whether public support is pertinent to the subject with respect to which the classification is made. Or otherwise stated, is obscenity less obscene when controlled by the State?

The General Assembly, in enacting these measures, sought to prevent dissemination of obscene items because of what they found to be a harm to society. Apparently, the harm arises from any contact with obscene matter. Yet they chose to allow such contact when the public is a party to it. Broadway contends that public purchase, exhibition or dissemination of such items has no effect on the nature or character of those items and can in no measure render them any less obscene. Thus state support is *not* pertinent to the subject.

How is the application of these sections discriminatory? Any person who works in a situation such as that occupied by employees of Broadway or Broadway itself is liable for prosecution for almost any imaginable contact with material found to be obscene. However, if the General Assembly, in its infinite wisdom, chose to support Broadway, it would be immune from prosecution. There is no doubt that such would create an unconstitutional situation because of an arbitrary distinction not pertinent to the situation.

It makes no difference that the extremes permissible under this situation may not now be in existence. The vital element is that the laws as presently constituted allow such an inequitable state of affairs. Broadway submits that when, as in this case, the Court recognizes the lack of equal protection inherent in the application of the threatened application of these laws the Court has no choice but to declare them unconstitutional and strike them down as the lower Court failed to do.

Respectfully submitted,

Burton W. Sandler
Attorney for Appellant.

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I on the 21st day of June, 1977

BROADWAY BOOKS, INC., Plaintiff

v.

COMMONWEALTH OF VIRGINIA,

and

RICHMOND BUREAU OF POLICE,

and

HONORABLE AUBREY M. DAVIS, JR., Respondents

Chancery No. G-669-1

ORDER

This day came the petitioner, by counsel, and petitioned this Court to temporarily enjoin the respondent Commonwealth Attorney of the City of Richmond and his assistants from prosecuting the petitioner, its employees, servants and agents under Sections 18.2-372-386, Virginia Code Ann. until August 16, 1977.

WHEREFORE, it is hereby ORDERED that the respondent Commonwealth Attorney's Office for the City of Richmond and his assistants are hereby temporarily enjoined from prosecuting the petitioner, its employees, agents and servants under Sections 18.2-372-386, Virginia Code Ann. until August 16, 1977.

A Copy, Teste: EDWARD G. KIDD, Clerk

I aks for this:

/s/J. Hatcher Johnson
305 Mutual Building
Richmond, Virginia 23219
Seen and Objected to:
/s/James E. Kulp
Assistant Attorney General
900 Fidelity Building
Richmond, Virginia 21219

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I The 6th day of August, 1977

BROADWAY BOOKS, INC. Plaintiff

v. Chancery No. G-669-I

COMMONWEALTH OF VIRGINIA, et als., Defendants

ORDER

This day came the petitioner, by counsel, and moved this Court to extend the temporary injunction, which enjoins the Commonwealth's Attorney of Richmond, Virginia, or his

assistants from prosecuting the petitioner, Broadway Books, Inc., its employees, servants or agents under Virginia Code Ann. Sections 18.2-372-386 until September 16, 1977.

WHEREFORE, it is ORDERED that the Commonwealth's Attorney of Richmond, Virginia and his assistants, are hereby enjoined from prosecuting the petitioner, Broadway Books, Inc., its employees, servants or agents under Virginia Code Ann. Sections 18.2-372-386 until September 16, 1977 or until such time as this Court determines the Constitutionality of the aforementioned Virginia Code sections.

A Copy,

Teste: EDWARD G. KIDD, Clerk

/s/Jessie M. Heddon
Deputy Clerk

APPENDIX B

CIRCUIT COURT

OF THE

CITY OF RICHMOND
September 16, 1977

James Edward Sheffield
Judge

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Re: Case No. G-669-1
Broadway Books, Inc.
v.
Commonwealth of Virginia and
Richmond Bureau of Police and
Honorable Aubrey M. Davis, Jr.

Gentlemen:

This cause comes upon the Broadway Books, Inc.'s (hereinafter "Broadway") Amended Petition For Declaratory Judgment and Injunctive Relief; upon the demurrer filed by Aubrey M. Davis, Jr., Commonwealth Attorney for the City of Richmond, Virginia (hereinafter "the respondent") (a Plea in Abatement having been sustained as to Col. Frank Duling, Chief, Richmond Bureau of Police) and upon the oral arguments of counsel for the respective parties. This cause presents the question as to the constitutionality of the Virginia obscenity statutes, Sections 18.2-372, *et. seq.*, Code of Virginia (1950), as amended. The Court's decision thereon follows.

The facts here are not in dispute.

Broadway is in the commercial business of distributing, for profit, presumptively protected First Amendment material to the adult citizens of the City of Richmond and the State of Virginia, and has been threatened by the respondent, Commonwealth's Attorney for the City of Richmond, through his assistants, and personnel assigned to the Bureau of Police of the City of Richmond with criminal prosecutorial application of Virginia Code Ann. §§18.2-372, *et. seq.*, Code of Virginia (1950), as amended, the Virginia obscenity statutes.

There is no issue here concerning whether the materials involved are "obscene." Broadway, however, asserts that the beforementioned statutory provisions are invalid and repugnant to the United States Constitution, on their face and in their application, as they deny to it, its agents, servants and employees their rights protected under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Broadway attackes these statutes on three particular grounds. It first asserts that they are illegal because they are vague. Secondly, it claims that they are overbroad. Finally, it argues that they deny to Broadway, its agents, servants and employees and other members of its class, the equal protection of the law.

Broadway thus prays that this Court enter a declaratory judgment declaring the above Virginia obscenity statutes to be unconstitutional on their face and/or, in their application for the above reasons and prays that the defendants be temporarily and permanently enjoined from arresting and prosecuting it, its agents, servants and employees under the aforementioned sections.

This Court finds no merit in Broadway's attack upon the statutes for vagueness or overbreadth. Broadway's argument that the Sections 18.2-372, *et. seq.* are void for vagueness and for overbreadth have been previously rejected by the Virginia Supreme Court and are not therefore here open now for new discussion. See: *Price v. Commonwealth*, 214 Va. 490 (1974) and *Alexander v. Commonwealth*, 214 Va. 539 (1974).

The only new issue raised here by Broadway, which has not been heretofore definitively decided by the Virginia Supreme Court is whether Code Section 18.2-383 of the Virginia obscenity statute (which enumerates certain entities which are exempted from the operation of the statutes), is unconstitutional on its face, and/or, in its application because it denies the equal protection of the laws to Broadway, its agents, servants and employees as guaranteed under the Fourteenth Amendment to the Constitution of the United States?

Broadway argues that the Code Section 18.2-383 discriminates against it, and all other non-enumerated entities by exempting certain non-commercial entities from the operation of the Virginia obscenity statutory scheme, and thereby violates the Equal Protection Clause of the Fourteenth Amendment. It further contends that the constitutional infirmity contained in Code Section 18.2-373 invalidates the constitutionality of the entire Virginia obscenity statutory scheme, as that Section is not severable from the scheme.

Code Section 18.2-383 exempts libraries, schools, institutions of higher learning, theaters, museums of fine arts supported by public appropriation from the application and prohibitions of the Virginia obscenity statutes in the following terms:

* * * * * * * *

> §18.2-383. *Exceptions to application of article* - Nothing contained in this article shall be construed to apply to:
> (1) The purchase, distribution, exhibition, or loan of any book, magazine, or other printed or manuscript material by any *library, school, or institution of higher learning supported by public appropriation.*
> (2) The purchase, distribution, exhibition, or loan of any work of art by any *museum of fine arts, school, or institution of higher learning, supported by public appropriation.*
> (3) The exhibition or performance of any play, drama, tableau, or motion picture by any *theatre, museum of fine arts, school or institution of higher learning, supported by public appropriation.*
>
> (Emphasis added).

* * * * * * * *

The main thrust of plaintiff's denial of equal protection of the law argument is, *inter alia*, that the entire statutory scheme, to-wit: Code Section 18.2-372 through 386 contains an arbitary, unreasonable, capricious and therefore unconstitutional classification among entities which ought to be treated equally, in that these sections authorize the dissemination of obscene materials by libararies, schools and institutions of higher learning which are supported by public appropriation while these same statutes subject every one else to criminal liability. Broadway argues that in order for these statutes to be construed as constitutional, they must be interpreted as authorizing the

dissemination, distribution, exhibition or sale of obscene materials by *all* adults, without *any exception.* Lastly, it argues that the classification created by the General Assembly creates no legitimate state interest and is not rational, but rather, is an arbitrary and improper exercise of power, as the differences between the classes established are not pertinent to the subject to which the classification is made and the object of the legislation.

Broadway here is a private, commercial profit seeking enterprise. The entities exempted from the operation of the Virginia obscenity statutes as stated in Code Section 18.2-372 through 386 are libararies, theatres, schools, museums of fine arts and institutions of higher learning supported by public appropriation and as such are basically non-profit, non-commercial enterprises.

The threshold issue therefore to be resolved is whether the plaintiff, Broadway, a commercial, profit seeking enterprise has requisite legal standing to challenge the constitutionality of the Virginia obscenity statutes, Code Section 18.2-372 through 386, on the ground of denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Broadway argues that it has standing to call into question the whole statutory scheme (even that Section of the statute which exempts entities totally unlike itself, i. e. non-profit public supported libraries, museums, institutions of higher learning, etc.) where it is subjected to the threatened criminal prosecutorial application of the statute.

The Commonwealth on the other hand argues, *inter alia,* that Broadway does not have standing here to attack the constitutionality of Code Section 18.2-383, which contains the exemptive provisions. First, it argues that Broadway must not only show that the legislation is invalid but must also allege and demonstrate that it has been personally injured by the enforcement of the statute or is in danger of sustaining some

direct injury as the result of its enforcement so as to warrant invocation of this Court's jurisdiction and to justify the exercise of the Court's remedial powers on its behalf, and it cannot do so. Secondly, it argues that Broadway must demonstrate that it is arguably within the zone of the interest protected by the statutory provision sought to be involved, and it cannot.

The Commonwealth further argues that here Broadway is engaged in the commercial enterprise of selling publications which may or may not be obscene, however, the exemptions enumerated in Code Section 18.2-383, *et. seq.* deal with public supported entities engaged in non-commercial enterprises; that while it may be that certain private schools and libraries not supported by public appropriations would have standing to complain about discrimination in the exemptions, petitioner has no standing to assert such claim on their behalf or for itself.

Broadway relies upon the United States Supreme Court's decision in *Freedman v. Maryland,* 380 U.S. 51 (1965) for its contention that once it is threatened with criminal prosecution under the Virginia obscenity statutes for dissemination of obscene materials, it has standing to call into question the constitutionality of any part of the Virginia obscenity statutory scheme, including the exemptive provisions of Code Section 18.2-383.

Freedman, supra, however, is distinguishable factually from the case at bar and therefore not apposite here. In *Freedman,* the defendant sough to challenge the constitutionality of the Maryland motion picture censorship statute, (Md. Ann. Code, 1957, Act 66A) and exhibited a film without first submitting the picture to the State Board of Censors as required by Section 2 of that statute, and was subsequently convicted of a Section 2 violation.

On appeal, the Maryland Courts of Appeals, held that since Freedman's refusal to submit the film to the State Board of Censors constituted a violation only of Section 2, Freedman

has restricted himself to a constitutional attack upon that section alone, and that he therefore lacked standing to challenge any of the other provisions or short-comings of the Maryland motion picture censorship statute.

The Supreme Court of the United States, however, did not agree. In reversing, the majority speaking through Mr. Justice Brennan, stated in pertinent part:

* * * * * * *

> Unlike the petitioner in Times Film, appellant does not argue that §2 is unconstitutional simply because it may prevent even the first showing of a film whose exhibition may legitimately be the subject of an obscenity prosecution. He presents a question quite distinct from that passed on in Times Film; accepting the rule in Times Film, *he argues that §2 constitutes an invalid prior restraint because in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's decision reversed.* Under the statute, the exhibitor is required to submit the film to the Board for examination, but no time limit is imposed for completion of Board action, §17. If the film is disapproved, or any elimination ordered, §19 provides that 'the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved the right of appeal from the decision of the Board to the Baltimore City

> Court of Baltimore City. There shall be a further right of appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals.'
>
> *Thus there is no statutory provision for judicial participation in the procedure which bars a film nor even assurance of prompt judicial review.* Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. *United Artists Corp. v. Maryland State Board of Censors,* 210 Md. 586, 124 A2d 292.
>
> In the light of the difference between the issues presented here and in Times Film, the Court of Appeals erred in saying that, since appellant's refusal to submit the film to the Board was a violation only of §2, "he has restricted himself to an attack on that section alone, and lacks standing to challenge any of the other provisions (or alleged shortcomings) of the statute." 233 Md., at 505, 197 A2d, at 236. *Appellant has not challenged the submission requirement in a vacuum but in a concrete statutory context. His contention is that §2 effects an invalid prior restraint because the structure of the other provisions of the statute contributes to the infirmity of §2; he does not assert that the other provisions are independently invalid.*
>
> * * * * * * *

Id. at 652-3 (emphasis added)

Thus, it can be readily seen from a close reading of the above portion of the Opinion that the Supreme Court of the United States found in *Freedman*, that the statutory structure of the Maryland censorship scheme of legislation, (which failed to contain a statutory provision for judicial participation in the overall procedure which barred a film, and the absence of any assurance for prompt judicial review), *had such a pervasive impact and effect upon Freedman's obligation and requirement to submit the film as required under Section 2 of the statutory* scheme, that such other parts of the statutory scheme contributed to the constitutional infirmity of Section 2 and therefore Freedman's appeal of his Section 2 violation necessarily put in issue the constitutionality of those other provisions of the statutory scheme.

Mr. Justice Brennan in *Freedman*, stated the following on the question of standing in the area of freedom of expression as follows:

* * * * * * * *

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. 'One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it.' *Thornton v. Alabama*, 310 US 88, 97, 84 L ed 1092, 1099, 60 S Ct 736; see *Staub v. City of Baxley*, 355 US 313, 319, 2 L ed 2d 302, 309, 78 S Ct 277; *Saia v. New York*, 334 US 558, 92 L 3d 1574, 68 S Ct 1148; *Thomas v. Collins*, 323 US 516, 89 L ed 430, 65 S Ct 615; *Hague v. CIO*, 307 US 496, 83 L ed 1423, 59 S Ct 954; *Lovell v. City of Griffin*, 303 US 444, 452-453, 82 L 3d 949; 954, 58 S Ct 666. Standing is recognized in such

> cases because of the . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' *NAACP v. Button*, 371 US 415, 433, 9 L ed 2d 405, 418, 83 S Ct 328; see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U Pa L Rev 67, 75-76, 80-81, 96-104 (1960). Although we have no occasion to decide whether the vice of oberbroadness infects the Maryland statute, we think that appellant's assertion of a similar danger in the Maryland apparatus of censorship - - one always fraught with danger and viewed with suspicion - - gives him standing to make that challenge. *In substance his argument is that because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.*
>
> * * * * * * * *
>
> *Id.* at 653-4 (Emphasis added)

The distinctions between *Freedman* and the case at bar are dramatic and apparent and clearly render that decision inapposite here. In *Freedman, no issue was raised as to whether Freedman was within the zone of interest sought to be protected by the Maryland censorship statute as is presented in reference to Broadway and the Virginia obscenity statute in the case at bar.* Further, there was no issue raised in *Freedman* as to whether he had requisite standing to challenge the constitutionality of all sections of the Maryland censorship statute, and the only issue presented in *Freedman*, pertinent to this point here, was whether, in fact, he had done so by appealing his conviction under Section 2 of the Maryland statute.

Here, *(unlike in Freedman,* the initial issue to be resolved is whether Broadway is within the class of those entities affected by the exemption section of the Virginia obscenity statute and thus has requisite standing, in the first instance, to challenge the constitutionality of the Virginia obscenity statute on the ground of an alleged illegal classification and consequent denial of the equal protection of the law as protected by the Fourteenth Amendment to the Constitution of the United States, not whether Broadway has in fact done so, as was the cas in *Freedman.*

More importantly, the Supreme Court of the United States in *Freedman* did *not* conclude, as Broadway argues here, that whenever one is threatened with criminal prosecution under a criminal statute, he has requisite standing to challenge any and all provisions of the statute. On the contrary, a close reading of the Supreme Court's decision in *Freedman* compels the conclusion that the Court held safeguards against undue inhibition of protected expression, the Section 2 requirement of prior submission of films to the Board of Censors, was rendered an *invalid prior restraint.* Further, that since *Freedman* had appealed his Section 2 conviction which had required prior submission of films, *he had called into question all aspects of the constitutionality of the entire statutory scheme.*

In *Freedman,* the provisions of the Maryland statutory censorship scheme, and the absence therefrom of certain protections in the Maryland statutory scheme, other than those found in the provisions and requirements of Section 2, had such an effect upon the prior submission requisite of Section 2 that the Court invalidated the submission requirement contained in Section 2.

Based upon the ruling announced in *Freedman,* it is the holding of this Court that it is only when the statutory scheme or a portion or segment thereof, has such a pervasive effect upon the Section under which one is prosecuted, or is about to be prosecuted, that gives one the requisite standing to test the constitutionality of the statutory scheme, or any other part thereof. We, therefore, apply this rule to the instant case.

In the case before this Court, unlike in *Freedman,* the exemptive provisions of Code Section 18.2-383, *et. seq.* have no direct or indirect effect upon any other part of the prohibitions or requirements made upon Broadway by any other part of the Virginia obscenity statutory scheme. The fact that Broadway may be prosecuted for the distribution of obscene materials is not directly or indirectly affected by the fact that others are not likewise prosecuted, who are exempted under the statutory scheme and are likewise distributing the same kinds of materials. This is necessarily so because the exemptive provisions have no pervasive effect upon Broadway's exposure to prosecution, nor its right and responsibilities under the statutory scheme.

This Court has likewise examiner the other authorities cited by Broadway in support of its position or its standing here and finds that they are either distinguishable factually or are legally inapplicable for other reasons and no good purpose would be served by a full discussion of each here.

This Court therefore rejects Broadway's contention that it has requisite standing here, in its own right, to challenge the constitutionality of the exemptive provisions contained in Code Section 18.2-383 or to challenge the Virginia obscenity statutory scheme because of its inclusion of Code Section 18.2-373 in such statutory scheme.

Broadway further advances the argument, *inter alia,* that the subjection to prosecution and punishment of all persons, i.e. schools, libraries and institutions of higher learning *not supported by public appropriation, and other adults engaged in commercial activities, subjects such entities to a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and that it has requisite standing to raise such issue here.*

This Court, however, rejects this argument and concludes that upon the record made in this case, Broadway likewise lacks requisite standing to challenge the constitutionality of the

exemptive provisions of Code Section 18.2-373 on behalf of others, or in order to secure the equal protection of the law for others, i.e., *non-commercial, private libraries, schools, museums of fine arts and schools or institutions of higher learning, which are not supported by public appropriations,* upon the ground that the exemption of such public supported entities constitutes an arbitrary classification in violation of the Equal Protection of the Law Clause of the Fourteenth Amendment to the Constitution of the United States.

In *Wayside Restaurant v. Virginia Beach,* 215 Va. 231 (1974), Mr. Justice Harman, writing for the Court stated the rule to be applied here as follows:

* * * * * * * *

> The rule is that where, as here, a line can be clearly drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. *Breard v. Alexandria,* 341 U.S. 622 (1951). Since the appellants have no standing to assert the rights of those engaged in non-commercial activity, we limit our consideration of the ordinance to its effect upon the commercial activity in which the appellants are engaged, namely, the licensed sale of beer and wine.

* * * * * * * *

Id. at 235

In the instant case, it is uncontroverted that Broadway is a private commercial, profit seeking entity. The entities sought to be exempted by Code Section 18.2-383 are clearly non-private, non-commercial, non-profit institutions supported by

public appropriation. It is therefore clear that the General Assembly has in Code Section 18.2-383, drawn a line between conduct undertaken by commercial and non-commercial entities and the rule established in Wayside, supra, emphatically mandates that in such an instance, Broadway does not have standing to rely upon the hypothetical rights of those in the commercial zone, but which are also libraries, schools, or institutions of higher learning, museums of fine arts and theatres, but not supported by public appropriation in order to attack the constitutionality of Code Section 18.2-383.

As is pointed out in the Memorandum of Law submitted by the Commonwealth private, commercial, profit seeking libraries, schools, institutions of higher learning, museums of fine arts and theatres, *not* supported by public appropriation, conceivably might have standing to raise the constitutional issue sought to be raised here by Broadway, however, this question is not reached here, and no opinion is expressed as to it, as none of such entities are now before the Court, and the resolution of question reserved for possible future determination.

Assuming, however, but not deciding, that Broadway has vicarious requisite standing to raise the issue of the constitutionality of the exemptive provisions of Code Section 18.2-383, either independently or as a part of the Virginia statutory scheme; and either in its own right, or to assert it on behalf of other potential entities, upon the record made here, this Court must conclude that Code Section 18.2-383 does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, as charged by Broadway.

Statutes enacted by the Virginia General Assembly are presumed to be constitutional unless illegality appears upon their face. *Joyner v. Centre Motor Co.,* 192 Va. 627 (1951). It is a rule of long standing in this jurisdiction that a statute's unconstitutionality must plainly appear before a court can declare it void. *Roanoke v. Elliott,* 123 Va. 393 (1918). Every reasonable presumption must be indulged and accorded a statute in favor of its legality. *Dean v. Paolicelli,* 194 Va. 219 (1951).

Further, the Supreme Court of Appeals in *Dean, supra,* stated the following rule as to how statutes are to be construed when their constitutionality is placed on issue:

* * * * * * *

> No act of the legislature should be held unconstitutional unless it is prohibited by the state or federal constitution in express terms or by necessary implication, nor should it be so construed as to bring it into conflict with constitutional provisions unless such a construction is unavoidable.

As noted above, the exemptive provisions contained in Code Section 18.2-383 are designed to exempt from the operation of the Virginia obscenity statutory scheme, non-commercial, libraries, schools, or institutions of higher learning, museums of fine arts, theatres, supported by public appropriation. The General Assembly has thus made a classification by drawing a distinction between conduct undertaken by certain enumerated non-commercial entities and those undertaken by commercial entities and has further drawn a distinction between those same entities, which are privately supported and those which are supported by public appropriation.

It has been held in legion decisions of the Supreme Court of Virginia that a statutory classification violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, (and Article I, Section II of the Virginia Constitution, as well), unless the classification is rational and the regulation of one class to the exclusion of other classes promotes a legitimate state interest. See, *e.g. Wayside Restaurant v. Virginia Beach,* 215 Va. 231, 237 (1974).

No evidence was taken on the oral argument held here in support of Broadway's Amended Petition For Declaratory Judgment and for injunctive relief, which would raise an issue as to the application of Section 18.2-383 equally within the class of commercial entities as being the basis of its unconstitutionality.

Therefore, the only other way that the Section could be unconstitutional, upon the record made here, is that its unconstitutionality appears on its face. In applying the above principals of statutory construction to Section 18.2-383, this Court concludes that Section 18.20383 is not facially violative of any provision of the Constitution of the United States.

On its face, the General Assembly, in the exemptive provisions of Section 18.20383, created one class of entities against whom the Virginia obscenity statutory scheme is made in-applicable, which class embraces non-commercial, non-profit libraries, schools, or institutions of higher learning, museums of fine arts, and theatres supported by public appropriation.

It created another class of entities which class embraces all other commercial, profit motivated entities, against whom the Virginia statutory scheme is made applicable, not supported by public appropriation.

It is incumbent upon the plaintiff here to refute the above discussed presumption of validity that Section 18.2-383 and the other provisions of the Virginia obscenity statutory scheme, now enjoys, by showing, by a preponderance of the evidence, an absence of a rational basis for the General Assembly's placement of the permitted use of obscene materials for non-commercial purposes by certain entities in one class and the prohibited use of obscene materials for commercial purposes in another. The plaintiff has here failed to refute the presumption of validity. Indeed, it is apparent from the face of the legislation that there are numerous valid reasons for the creation of the two classes and such reasons provide a rational basis for the separate classification and the prohibition upon the use of such materials for commercial purposes.

Presumably, the first of the above classes would not use obscene materials for commercial, profit making purposes, but would use them as objects of an art form; materials of artistical or historical significance, or as a form of expression of opinion in the market place of ideas; and for exhibitions, presentations,

shows or performances as a form of expression, speech, and information, as exploitation of obscenity.

Presumably, the second of the above classes would utilize obscene materials for purely commercial purposes only.

The members of the former class, (the enumerated non-commercial entities may well enjoy protection under the First Amendment to the Constitution of the United States, whereas the members of the latter class, (commercial entities), do not. The classification thus made here by the General Assembly in Section 18.2-383 is rational.

Moreover, the reasons for the classifications contained in Code Section 18.2-383 are natural, substantial and reasonable in ligh light of the subject matter and the evil sought to be eliminated. The evil here sought to be eliminated being the elimination of the commercialization of obscene materials, which enjoy no constitutional protection. Even though there is here in the record no conclusive proof of the connection between anti-social behavior and the commercial dissemination of obscene materials by commercial entities, the General Assembly may reasonably determine that such a connection does or may exist, and may legitimately act on such an assumption by enacting the present Virginia obscene statutory scheme to protect the social interest in order and morality. See: *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

Further, since the dissemination of obscene materials in public establishments for purely commercial purposes may offend the morals of a community, the State has an obligation to the public to protect the morals of the community.

The State has a legitimate interest at stake here in stopping the trade of commercialized obscenity. Rights and interests of other than the advocates here are involved. These include the interests of the public in a quality of life including the right to a decent society. The Commonwealth has a right to protect society's interest in order and morality. *Roth v. United States*, 354 U.S. 485. See also *Wayside, supra, Id.* at 237.

The classification therefore contained in Code Section 18.2-383 is directed at the attainment of a legitimate State interest and is not therefore violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and this Court so holds.

CONCLUSION

For the above stated reasons, the relief prayed for in plaintiff's Amended Petition for Declaratory Judgment and Motion For A Permanent Injunction is denied and the temporary injunction previously ordered by this Court will terminate and expire on September 16, 1977, at 12:00 midnight. The enclosed Order, a copy of which is attached, has been entered this date.

Very truly yours,

James Edward Sheffield

Enclosure

VIRGINIA:

In The Circuit Court Of The City of Richmond, Division I,

THE 16th DAY OF September 1977

BROADWAY BOOKS, INC. Plaintiff

v.

COMMONWEALTH OF VIRGINIA
and
RICHMOND BUREAU OF POLICE
and
HONORABLE AUBREY M. DAVIS, JR. Defendants

ORDER

THIS MATTER came on to be heard on the papers previously filed herein, upon argument of counsel, on the plaintiff's Petition for Declaratory Judgment and for permanent injunctive relief, and the Court having taken time to consider its judgment to be rendered herein, for the reasons set forth in writing, the Court doth deny the plaintiff's motion for a permanent injunction and for the requested declaratory relief, and the temporary injunction entered herein shall terminate on the date of September 16, 1977, at 12:00 midnight.

To all of which action by the Court, the Court notes the plaintiff's objection.

A copy,
Teste: Edward G. Kidd,
Clerk

/s/Jean B. Chapman,
Deputy Clerk

VIRGINIA:

In The Circuit Court Of The City of Richmond, Division I,

BROADWAY BOOKS, INC. Plaintiff

v.

COMMONWEALTH OF VIRGINIA
and
RICHMOND BUREAU OF POLICE
and
HONORABLE AUBREY M. DAVIS, JR. Defendants
Commonwealth's Attorney
City of Richmond
John Marshall Courts Building
Richmond, Virginia

* *

NOTICE OF APPEAL

TO: THE HONORABLE EDWARD KIDD, CLERK
CIRCUIT COURT OF THE CITY OF RICHMOND,
DIVISION I, CIVIL SECTION

The plaintiff, Broadway Books, Inc., hereby notes his appeal from the judgment rendered by this Court on September 16, 1977 whereby the Court denied the plaintiff's motion for permanent injunction and request for declaratory relief.

STATEMENT PURSUANT TO RULE 5:6

A transcript of the hearing of this case will be filed hereafter.

BROADWAY BOOKS, INC.

/s/J. Hatcher Johnson
Of Counsel

CERTIFICATE

I certify that I have mailed, postage prepaid, a true copy of this Notice of Appeal to James E. Kulp, Esq., Assistant Attorney General, 900 Fidelity Building, Richmond, Virginia 23219, this 19th day of September, 1977.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 10th day of April, 1978.

BROADWAY BOOKS, INC., Appellant,

against Record No. 771862
Circuit Court No. G-669-1

COMMONWEALTH OF VIRGINIA, et al., Appellees.

From the Circuit Court of the City of Richmond, Division I

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,
Teste: Allen L. Lucy, Clerk
By: Richard R. Bauish
Deputy Clerk

BROADWAY BOOKS, INC.	* IN THE
Appellant	* SUPREME COURT OF
v.	* THE COMMONWEALTH
COMMONWEALTH OF VIRGINIA	* OF VIRGINIA
Appellee	

* *

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Broadway Books, Inc., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Virginia, affirming the dismissal of the complaint, entered in this action on April 10, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

J. Hatcher Johnson
White & Wood, P.C.
300 West Main Street
Richmond, Virginia 23220
(804) 782-1111
Of Counsel

Burton W. Sandler
Suite 600, Towson Towers
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 1st day of May, 1978, a true copy of the foregoing Notice of Appeal to th e Supreme Court of the United States was mailed to James E. Kulp, Assistant Attorney General of the Commonwealth of Virginia, 900 Fidelity Building, Richmond, Virginia 23219.

J. Hatcher Johnson

AMENDMENTS TO THE CONSTITUTION

[AMENDMENT I]
[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * * *

[AMENDMENT IV]
[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[AMENDMENT V]
[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT VI]
[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[AMENDMENT XIV]
[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF VIRGINIA

§ 18.2-372. **"Obscene" defined.** – The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value. (Code 1950, § 18.1-227; 1960, c. 233; 1975, cc. 14, 15.)

§ 18.2-373. **Obscene items enumerated.** – Obscene items shall include:

(1) Any obscene book; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds. (Code 1950, § 18.1-229; 1960, c. 233; 1975, cc. 14, 15.)

§ 18.2-374. Production, publication, sale, possession, etc., of obscene items. – It shall be unlawful for any person *knowingly* to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) *Have in his possession with intent to sell, rent,* lend, transport, or distribute any obscene item. *Possession in public or in a public place of any obscene item as defined in this article* shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another. (Code 1950, § 18.1-228; 1960, c. 233; 1962, c. 289; 1970, c. 204; 1975, cc. 14, 15.)

§ 18.2-375. Obscene exhibitions and performances. – It shall be unlawful for any person knowingly to:

(1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition of performance of any obscene motion picutre, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre than receiving salary and wages; or

(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place. (Code 1950, § 18.1-230; 1960, c. 233; 1971, Ex. Sess., c. 191; 1975, cc. 14, 15.)

§ 18.2-376. Advertising, etc., obscene items, exhibitions or performances. -- It shall be unlawful for any person knowingly to prepare, print, publish, or circulate, or cause to be prepared, printed, published or circulated, any notice or advertisement of any obscene item proscribed in § 18.2-373, or of any obscene performance or exhibition proscribed in § 18.2-375, stating or indicating where such obscene item, exhibiton, or performance may be purchased, obtained, seen or heard. (Code 1950, § 18.1-231; 1960, c. 233; 1975, cc. 14, 15.)

§ 18.2-378. Coercing acceptance of obscene articles or publications. – It shall be unlawful for any person, firm, association or corporation, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to require that the purchaser or consignee receive for resale any other article, book, or other publication which is obscene; nor shall any person, firm, association or corporation deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such articles, books, or publications, or by reason of the return thereof. (Code 1950, § 18.1-233; 1960, c. 233; 1975, cc. 14, 15.)

§ 18.2-379. Employing or permitting minor to assist in offense under article. – It shall be unlawful for any person knowingly to hire, employ, use or permit any minor to do or assist in doing any act or thing constituting an offense under this article. (Code 1950, § 18.1-234; 1960, c. 233; 1975, cc. 14, 15.)

§ 18.2-380. Punishment for first offense. – Any person, firm, association or corporation convicted for the first time of an offense under §§ 18.2-373 through 18.2-379, shall be guilty of a Class 1 misdemeanor. (Code 1950, § 18.1-235.1; 1968, c. 662; 1975, cc. 14, 15.)

§ 18.2-381. **Subsequent offenses.** – Any person, firm, association or corporation convicted of a second or other subsequent offense under §§ 18.2-373 through 18.2-379 shall be guilty of a Class 6 felony. (Code 1950, § 18.1-236.1; 1960, c. 233; 1968, c. 662; 1975, cc. 14, 15.)

§ 18.2-382. **Photographs, slides and motion pictures.** – Every person who knowingly:

(1) Photographs himself or any other person, for purposes of preparing an obscene film, photograph, negative, slide or motion picture for purposes of sale or distribution; or

(2) Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for purposes of sale or distribution:

shall be guilty of a Class 3 misdemeanor. (Code 1950, § 18.1-235; 1960, c. 233; 1970, c. 204; 1975, cc. 14, 15.)

§ 18.2-383. **Exceptions to application of article.** – Nothing contained in this article shall be construed to apply to:

(1) The purchase, distribution, exhibition, or loan of any book, magazine, or other printed or manuscript material by any library, school, or institution of higher learning, supported by public appropriation;

(2) The purchase, distribution, exhibition, or loan of any work of art by any museum of fine arts, school, or institution of higher learning, supported by public appropriation;

(3) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum of fine arts, school or institution of higher learning, supported by public appropriation. (Code 1950, § 18.1-236.2; 1960 c. 233; 1966, c. 516; 1975, cc. 14, 15.)

§ 18.2-384. **Proceeding against book alleged to be obscene.** – (1) Whenever he has reasonable cause to believe that any person is engaged in the sale or commercial distribution of any obscene book, any citizen or the attorney for the Commonwealth of any county or city, or city attorney, in which the sale or commercial distribution of such book occurs

may institute a proceeding in the circuit court in said city or county for adjudication of the obscenity of the book.

(2) The proceeding shall be instituted by filing with the court a petition:

(a) Directed against the book by name or description.

(b) Alleging the obscene nature of the book; and

(c) Listing the names and addresses, if known, of the author, publisher, and all other persons interested in its sale or commercial distribution.

(3) Upon the filing of a petition pursuant to this article, the court in term or in vacation shall forthwith examine the book alleged to be obscene. If the court find no probable cause to believe the book obscene, the judge thereof shall dismiss the petition; but if the court find probable cause to believe the book obscene, the judge thereof shall issue an order to show cause why the book should not be adjudicated obscene.

(4) The order to show cause shall be:

(a) Directed against the book by name or description;

(b) Published once a week for two successive weeks in a newspaper of general circulation within the county or city in which the proceeding is filed;

(c) If their names and addresses are known, served by registered mail upon the author, publisher, and all other persons interested in the sale or commercial distribution of the book; and

(d) Returnable twenty-one days after its service by registered mail or the commencement of its publication, whichever is later.

(5) When an order to show cause is issued pursuant to this article, and upon four days' notice to be given to the persons and in the manner prescribed by the court, the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

(6) On or before the return date specified in the order to show cause, the author, publisher, and any person interested in the sale or commercial distribution of the book may appear and file an answer. The court may by order permit any other person to appear and file an answer amicus curiae.

(7) If no one appears and files an answer on or before the return date specified in the order to show cause, the court, upon being satisfied that the book is obscene, shall order the clerk of court to enter judgment that the book is obscene, but the court in its discretion may except from its judgment a restricted category of persons to whom the book is not obscene.

(8) If an appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing. The court shall conduct the hearing in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury. At the hearing, the court shall receive evidence, including the testimony of experts, if such evidence be offered, pertaining to:

(a) The artistic, literary, medical, scientific, cultural and educational values, if any, of the book considered as a whole;

(b) The degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought;

(c) The intent of the author and publisher of the book;

(d) The reputation of the author and publisher:

(e) The advertising, promotion, and other circumstances relating to the sale of the book;

(f) The nature of classes of persons, including scholars, scientists, and physicians, for whom the book may not have prurient appeal, and who may be subject to exception pursuant to subsection (7).

(9) In making a decision on the obscenity of the book, the court shall consider, among other things, the evidence offered pursuant to subsection (8), if any, and shall make a written determination upon every such consideration relied upon in the proceeding in his findings of fact and conclusions of law or in a memorandum accompanying them.

(10) If he finds the book not obscene, the court shall order the clerk of court to enter judgment accordingly. If he finds the book obscene, the court shall order the clerk of court to enter judgment that the book is obscene, but the court in its discretion, may except from its judgment a restricted category of persons to whom the book is not obscene.

(11) While a temporary restraining order made pursuant to subsection (5) is in effect, or after the entry of a judgment pursuant to subsection (7), or after the entry of judgment pursuant to subsection (10), any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute or exhibit the book, is presumed to have knowledge that the book is obscene under §§ 18.2-372 through 18.2-378 of this article.

(12) Any party to the proceeding, including the petitioner, may appeal from the judgment of the court to the Supreme Court of Virginia, as otherwise provided by law.

(13) It is expreslly provided that the petition and proceeding authorized under this article, relating to books alleged to be obscene, shall be intended only to establish scienter in cases where the establishment of such scienter is thought to be useful or desirable by the petitioner; and the provisions of § 18.2-384 shall in nowise be contrued to be a necessary prerequisite to the filing of criminal charges under this article. (Code 1950, § 18.2-236.3; 1960, c. 233; 1975, cc. 14, 15.)

§ 18.2-385. Section 18.2-384 applicable to motion picture films. – The provisions of § 18.2-384 shall apply mutatis mutandis in the case of motion picture film. (Code 1950, § 18.1-236.4; 1966, c. 516; 1975, cc. 14, 15.)

§ 18.2-386. Showing previews of certain motion pictures. – It shall be unlawful for any person to exhibit any trailer or preview of any motion picture which has a motion picture industry rating which would not permit persons in the audience viewing the feature motion picture to see the complete motion picture from which the trailer or preview is taken. Persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (Code 1950, § 18.1-246.1; 1970, c. 504; 1975, cc. 14, 15.)

In The

Supreme Court of the United States

October Term, 1978

No. 78-55

BROADWAY BOOKS, INC.

Appellant,

v.

COMMONWEALTH OF VIRGINIA, ET AL.,

Appellees.

On Appeal from the Supreme Court of the Commonwealth of Virginia

MOTION TO DISMISS THE APPEAL AND AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

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PRELIMINARY STATEMENT

The appellees respectfully move this Honorable Court to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of Virginia entered in this case on April 10, 1978.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a memorandum opinion which is not reported, but is set out in the appendix of the Jurisdictional Statement, p. A. 24.

JURISDICTION

Appellant asserts jurisdiction under Section 28 U.S.C. § 1257(2).

I.

The Appeal Should Be Dismissed For Failure To Present A Substantial Federal Question.

The appellant sets forth basically two matters on this appeal. First, that the Virginia courts erred in not holding that the Virginia obscenity statutes, §§ 18.2-372 through -386 are void for vagueness and overbreadth. Such an issue does not present a substantial federal question in light of this Court's decision in *Miller* v. *California,* 413 U.S. 15 (1973), and companion cases.

Second, the appellant asserts that § 18.2-383 of the Virginia Code denies it equal protection in that this statute exempts certain museums of fine art, libraries, and institutions of higher learning supported by public appropriation from the provisions of Virginia obscenity laws. This question raises the issue of classification which is neither new nor novel. This Court has long held that one class may be treated in one manner and another class in a different manner. See *Caskey Baking Co.* v. *Virginia,* 313 U.S. 117 (1941); *McGowan* v. *Maryland,* 366 U.S. 420 (1961). *Cf. Young* v. *American Mini Theatre, Inc.,* 427 U.S. 50 (1976) (Zoning Ordinances for "Adult" movie theaters, bookstores, and similar establishments). The appellees assert that this question fails to present a substantial federal question.

II.

The Judgment Of The Supreme Court Of Virginia Should Be Affirmed.

The appellant first asserts that it has standing to contest the constitutionality of § 18.2-383 which exempts certain

museums of fine art, libraries, and institutions of higher learning supported by public appropriation from the provisions of the Virginia Obscenity Law. It is uncontroverted that appellant is a private commercial, profit seeking enterprise (App. 8, 16). The Virginia obscenity statutes clearly apply to commercial enterprises such as appellant. Where a line can be clearly drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. *Breard* v. *Alexandria,* 341 U.S. 622 (1951).

The exempted entities do not engage in commercial competition with appellant and their exemption does not deprive petitioner of any profits or sales. Appellant, as well as other commercial enterprises of a similar nature, flourish within the Commonwealth of Virginia and the provisions of § 18.2-383 have no deterrent effect on legitimate expression and the appellant should not be permitted to assert the rights of third parties. See *Young* v. *American Mini Theaters, Inc., supra.*

Whether the Virginia courts were correct in finding that appellant had no standing to contest the constitutionality of § 18.2-383 is moot since the Virginia courts did in fact consider the merits of appellant's constitutional attack (App. 17-21).

Petitioner's basic attack upon § 18.2-383 is based upon an assertion that the exempted entities constitute an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment. The legislature is free to adopt any classification it deems appropriate to promote general welfare so long as the classification bears a reasonable rela-

tion to a proper legislative purpose. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland, supra; English* v. *Virginia Probation and Parole Board,* 481 F.2d 188 (4th Cir. 1973).

The evil which is sought to be eliminated by the Virginia obscenity statutes is the commercialization of obscene materials, which enjoy no constitutional protection. This demarcation between commercial and non-commercial conduct is natural, substantial and reasonable in light of the subject matter and the evil sought to be eliminated.

The validity of the exemptions under § 18.2-383 is further supported by this Court's decision in *Miller* v. *California, supra.* In *Miller,* this Court set down the guidelines for determining whether a work is obscene. One of the tests is whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The entities exempted by § 18.2-383 recognized this test since works having serious literary, artistic, political, or scientific value are generally housed in libraries, schools, and museums of fine art.

The appellant tries to buttress its argument by stating that a group of students at the University of Virginia, an institution supported by public apporopriation, exhibited commercially to the general public, for a fee, the motion picture *Deep Throat,* while simultaneously, in the City of Richmond, an individual was tried and found guilty under the obscenity statutes for distributing the same film. The appellant presented no evidence in this case, consequently

there is nothing upon which this Court can conclude that the motion picture shown in Charlottesville was in fact the same as the one shown in Richmond. Additionally, the film in Charlottesville was not sponsored by the University of Virginia, an exempt institution under § 18.2-383, and the students were subject to the same provisions of the Virginia obscenity law as is the appellant.

The appellant also asserts that §§ 18.2-372 through -386 are void for vagueness and overbreadth. In *Price* v. *Commonwealth,* 214 Va. 490 (1974), the Supreme Court of Virginia found that the Virginia obscenity statutes, as construed, prohibit only hard core pornography and were consistent with this Court's decision in *Miller* v. *California,* and companion cases.

CONCLUSION

For the foregoing reasons, the appellees submit that this Honorable Court should dismiss the appeal for the failure to present a substantial federal question or in the alternative affirm the judgment of the Supreme Court of Virginia since it is consistent with prior decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, counsel for the appellees in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on or before the 29th day of September, 1978, I mailed, first class postage prepaid, three copies of the foregoing to Burton Sandler, Suite 600, Towson Towers, 28 Allegheny Avenue, Baltimore, Maryland 21204, counsel of record for appellant.

JAMES E. KULP
Deputy Attorney General